SUPREME COURT, U. S.

FILED
JUL 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-185

ANNA BURNS,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LA ROSSA
Attorney for Petitioner
Anna Burns
522 Fifth Avenue
New York, New York 10036
(212) 687-4100

GERALD L. SHARGEL
Of Counsel

July 26th, 1973

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The Petitioner, Anna Burns, prays that a Writ of Certiorari issue to review the judgment entered on June 27th, 1973, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, against Prentiss McCollum, et al., Defendants-Appellants.

Opinion Below

The Petitioner's conviction was affirmed by the Circuit Court of Appeals without opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 27th, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in sustaining Petitioner's conviction of a single conspiracy where proof at trial demonstrated that multiple conspiracies existed?

2. Was the trial court required, in its charge on conspiracy to violate Title 18, United States Code, Sections 2312 and 2313, to instruct the jury that they must find that the Petitioner had knowledge of the interstate transportation of the allegedly stolen automobiles?

Statutory Provisions

Title 18, United States Code, Section 371, provides in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2312, provides as follows:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2313, provides as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Statement of the Case

The Petitioner, Anna Burns, was charged along with 20 other named defendants in a 30 count Indictment charging violations of Title 18, United States Code, Sections 2312, 2313, 2314, 371 and 2. Nine of these defendants including the Petitioner proceeded to trial to contest the Government's allegation that each had participated in a single conspiracy to steal, falsely register, sell and dispose of luxury automobiles in several states along the Eastern seaboard. The proof at trial, considered in the light most favorable to the Government, demonstrated the Petitioner's involvement with three different stolen motor vehicles which were allegedly transported into New Jersey.

John Vaden, an indicted co-conspirator who pleaded guilty, testified that during the term of the alleged conspiracy he participated, at the direction of the defendant McCollum, in the theft of automobiles which he subsequently transported to various states including New Jersey, Maryland and Washington, D.C. (T 58, 86, 111, 161 and 173)* With regard to the Petitioner, Vaden testified that

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* The letter "T" introduces reference to the trial transcript.

in October, 1970 he met the defendant Frank Jenkins, later described as the boy friend of the Petitioner, and agreed to transport a 1970 brown Lincoln to New Jersey. (T 111) This car, which Jenkins described as stolen was started by a screwdriver because the key device had been tampered with. (T 114) According to Vaden, the car was delivered in that condition to the home of the Appellant. (T 118-119)

The witness Vaden also described a subsequent incident a week and a half or two weeks later where the defendant Jenkins again requested Vaden to deliver another car to New Jersey. (T 136) Describing a similar procedure, with regard to another 1970 brown Lincoln bearing New Jersey license plates, Vaden stated that with this car also the ignition had been removed from the car and that a screwdriver had been inserted. On this occasion, however, the Lincoln was delivered to the parking lot of a restaurant near the George Washington Bridge. (T 140) It was there that the witness again encountered the Petitioner, Anna Burns. (T 141)

Cynthia Wharton, a co-conspirator witness, testified that her duties in the criminal enterprise involved the preparation and sale of fraudulent registrations for stolen cars. (T 657) Wharton testified that several of these fraudulent registrations were prepared in the name of the Petitioner at the request of the defendant, Jenkins. (T 687, 750 and 764)

Gerald Cooper, also a participant in the conspiracy, related that he had registered a stolen Ford van in the name of Anna Balcga, a pseudonym used by the Petitioner. (T 1343, 1355, 1965)

In addition to this testimony, more than 40 witnesses testified to various aspects of what was alleged to have been a wholesale distributorship of stolen cars. These witnesses included accomplices, victims of thefts, unknowing purchasers of these autos, law enforcement officials and Department of Motor Vehicle officials from New York, New Jersey, Washington, D.C. and Maryland. These witnesses gave no testimony relative to the alleged participation of the Petitioner, Anna Burns. Indeed, there was no evidence that the Petitioner's participation went beyond three vehicles specified above. Although two of these vehicles were found in the possession of the Petitioner by the New Jersey State Police, (T 2331, 2340) there was no proof that the Petitioner had knowledge of the object of the overall conspiracy charge.

Reasons for Granting the Writ

A. The Multiple Conspiracy Issue.

The Circuit Court of Appeals, by affirming the conviction below without opinion, has condoned what has become an all too frequent practice in our Federal District Courts. This is, joining individual defendants in mass trials with numerous defendants having significantly different roles of participation where one or more defendants have no knowledge or reason to know of a single overall conspiracy. With regard to the case of the Petitioner, Anna Burns, it is submitted, just such an instance exists.

As urged in the Court of Appeals, the proof in relation to the Petitioner was that she enjoyed a social relationship with the defendant, Frank Jenkins, who was shown to have

provided the Petitioner with two and possibly three allegedly stolen automobiles. There was absolutely no evidence that the Petitioner was more deeply involved in the overall conspiracy to steal, transport and distribute stolen vehicles.

The Court's decision in the instant case, it is submitted, is contrary to this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). Both *Kotteakos* and the instant case involve the so-called "wheel" conspiracy where the only nexus between the substantive transactions is a common participant or participants. In the case at bar, the Petitioner was not shown to have been concerned with any other allegedly stolen car except the three registered in her name. Further, the Petitioner in no way was alleged to have aided in the procuring of stolen automobiles for other recipients. Therefore, each delivery of a stolen automobile was separate and distinct from all the others. The result is that the Government has proved a number of separate transactions or conspiracies rather than a single one. Petitioner urges that the common object of a number of conspiracies, in this case to steal and distribute automobiles, is insufficient to constitute a single overall conspiracy. *Blumenthal* v. *United States*, 322 U.S. 539 (1947). The resultant prejudice surfaced in the form of a multitude of incidents of criminal misconduct which did not involve the Petitioner. As the Circuit Court stated in *United States* v. *Branker*, 395 F. 2d 881 (2nd Cir., 1968),

> "The mounting proof of the guilt of the hub conspirators can reasonably be believed to have affected the Petitioner therein."

B. The Court's Charge.

In charging the jury on the law of conspiracy the trial court in the case at bar failed to instruct the jury that in order to convict the defendants of conspiracy, they must have found beyond a reasonable doubt that the defendants knew that the allegedly stolen automobiles had traveled in interstate commerce. *United States* v. *Vilhotti*, 452 F. 2d 1186 (2nd Cir., 1971); *United States* v. *Fields*, 466 F. 2d 119 (2nd Cir., 1972). The Government, in an apparent concession that this omission from the charge was error, argued below that the Petitioner was not substantially prejudiced and that "plain error" did not occur. RULE 52(b), FEDERAL RULES OF CRIMINAL PROCEDURE. Petitioner herein submits that this omission, although not brought to the attention of the trial court, was tantamount to omitting one of the essential elements of the conspiracy charge. For this reason, it is submitted that the jury could not have properly considered the elements necessary to return a conviction on the conspiracy charge.

The Petitioner, Anna Burns, adopts and urges each of the Points which may be asserted by her co-Petitioners in the United States Court of Appeals in their Petition to this Court for a Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

JAMES M. LA ROSSA
Attorney for Petitioner
Anna Burns
522 Fifth Avenue
New York, New York 10036

GERALD L. SHARGEL
Of Counsel

July 26, 1973

APPENDIX

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
Circuit Judges,

73-1378 73-1408 73-1453 73-1486

United States of America,
Plaintiff-Appellee,

v.

Prentis McCollum, Will W. L. Grissett, Ben Floyd Jr., Frank Jenkins, Fred Noel Grimes, Ana Burns, Dennis Burns, Donald Prince Shackelford, Willie Hudson, McNair, Annie Louise Wyche, Leonard Quick, Margaret McCollum, Vera Horne, James Blanton Elder, Robert Edward Quick, William Johnson, Holly B. Tyner, Christopher Miller, Samuel Collins, Edward Poe, Willie Albert Allen and Gilbert Reaves,

Defendants,

Prentis McCollum, Frank Jenkins, Ana Burns, Annie Louise Wyche,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk